United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7054

To be argued by
DON ALLEN RESNIKOFF

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P/S

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

STATEN ISLAND SUPPLY COMPANY, INC.,

Plaintiff-Appellee,

vs.

A.O. SMITH CORPORATION, EQUIPMENT DISTRIBUTORS CORP. and BROOKLYN UNION GAS COMPANY,

Defendants,

A.O. SMITH CORPORATION,

Defendant-Appellant.

On Appeal From the United States District Court For the Eastern District of New York

REPLY BRIEF FOR ~~PLAINTIFF~~ Defendant-APPELLANT

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REPLY BRIEF FOR APPELLANT

ARGUMENT

POINT I

Problems like plaintiff's fraud, disobedience of court orders, repetition of improper behavior and failure to bring its case to trial are not "very small and insignificant matters"

Plaintiff-appellee argues in its brief that the District Court was right to refuse any order directed at

plaintiff's derelictions. Why? Because plaintiff's derelictions are said to be "a variety of very small and insignificant matters." (Appellee's Brief, p. 16)

A few illustrations will show that the derelictions discussed in Smith's main brief are not "small and insignificant matters."

Fraud is not a "small and insignificant matter"

It is argued in Appellee's Brief that the plaintiff-appellee's filing of false warranty reports with Smith during the preliminary injunction period is unimportant because, inter alia, "only the name and address [on the reports] was false." (Appellee's Brief, p. 10) Also, the "practice [of submitting false reports] continued after the granting of the preliminary injunction as [plaintiff-appellee] SISCO's officer 'forgot about the subterfuge...and failed to notify the record keeper that this subterfuge was no longer needed.'"

The arguments of plaintiff-appellee's brief do not succeed in making plaintiff's fraud "small and insignificant." Concerning plaintiff's supposed failure to discover its own fraud, the name signed on

the false warranty reports of plaintiff is "Edmund G. Schwimer". (e.g. A141) Edmund G. Schwimer is President of plaintiff, and was plaintiff's first witness at the preliminary injunction hearing before the District Court. (A18) As stated in Judge Platt's opinion of May 1, 1975, plaintiff is "a small family-owned company" (A17), a circumstance which makes plaintiff's ignorance of its own fraud most unlikely.

Plaintiff's claim that falsifications were caused by fear of termination, and that only reports of replacements of heaters sold outside of Staten Island were falsified, has clearly been shown to be disingenuous (A212-219).

Good faith is not demonstrated merely because plaintiff refrained from submitting false statements after Smith moved to dissolve the preliminary injunction.

Plaintiff-appellee may wish to pretend the contrary, but the record before the District Court is clear that plaintiff's falsification of warranty reports was a serious source of damage to appellant Smith. Relevant portions of the record are reviewed at Smith's main brief beginning at page 14, and not repeated here.

Disobedience of court orders is not "a small and insignificant matter"

As mentioned in Smith's main brief, at page 9, plaintiff's counsel, by letter dated December 9, 1975, stated that plaintiff had made retail sales of Smith's products on Staten Island in a specified amount during the first six months of the preliminary injunction period. That

amount is in excess of the amount stated to be permissible at page 11, numbered paragraph 1) of the order of the Honorable Thomas C. Platt dated May 1, 1975 (A27). Plaintiff's disobedience of the Court order is not a "small and insignificant matter."

Purposeful repetition of improper behavior is not a "small and insignificant matter"

Point I of plaintiff-appellee's brief, "PUBLIC DISPARAGEMENT (VILLIFICATION) OF SMITH EMPLOYEES", emphasizes points in supposed mitigation of plaintiff's repeated disparagements.

It is clear, however, that the supposed mitigating circumstances do not justify absence of an appropriate District Court order. The sequence of events is instructive: Smith's application for an order concerning continuation of the preliminary injunction, and for other relief, was made in September, 1975 (A29 et seq.), in part on the basis of the August, 1975, disparagements of Smith employees by plaintiff. Plaintiff's "apology" for the disparagement, referred to at page 6 of plaintiff-appellee's brief, was part of an affidavit of plaintiff filed in opposition to Smith's application, and included the statement of plaintiff's

Vice President that "Such expression will not occur again." (A147) The affidavit of plaintiff's Vice President was sworn to September 18, 1975.

Plaintiff's repeated disparagement of a Smith employee (described at pages 12 and 13 of Smith's main brief) occurred in November, 1975, some weeks after plaintiff filed its formal affidavit promising no further disparagement. At the time of plaintiff's November, 1975, repetition of disparagement, Smith's September, 1975, application for relief was awaiting decision of the District Court; the Smith application had not yet been referred to Magistrate Catoggio for report.

It is difficult to escape the conclusion that plaintiff's November, 1975, disparagement of a Smith employee was a purposeful repetition of an act which plaintiff itself characterized as wrong in its September, 1975, affidavit.

Purposeful repetition of an improper act is not a "small or insignificant" matter, but rather is a problem which deserved the solution of an appropriate Court order.

Plaintiff's failure to bring its case to trial is not a "small or insignificant matter"

It is clear that where there is a preliminary injunction which forces a business relationship between a defendant-manufacturer and its plaintiff-distributor, defendant has a "right to apply for a dissolution if the action is not moved speedily to trial." Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, 1208 (2d Cir., 1970), see also Levin v. Ruby Trading Corp., 352 F.2d 508, 509 (2d Cir., 1965).

The record on the point of trial delay is not obscure, plaintiff-appellee's brief notwithstanding. The preliminary injunction will be one year old on May 1, 1976 (13 months if the period of the temporary restraining order of March 31, 1975, is counted). Generally recognized good practice and Local Civil Rule 4 of the Eastern District provide for concurrent discovery by the parties, so that there can be no weight to plaintiff's argument that plaintiff's efforts at discovery were precluded by Smith's prompt efforts at discovery.

Similarly, generally recognized good practice and Local Civil Rule 4 of the Eastern District provide that requests for deposition specify time and place, and that there should be application to the Court for orders fixing time and place of deposition, should stipulation of counsel not

be possible. Neither notices of deposition by plaintiff nor plaintiff's applications for orders for depositions appear in the record before this Court.

Local Rule 4 reads:

"RULE 4 - Order of Taking Depositions

> From and after the fortieth day after commencement of an action, unless otherwise ordered by the court for good cause shown, neither the service of a notice to take the deposition upon oral examination of party or witness, nor the pendency of any such deposition, shall prevent another party, adverse or otherwise, from noticing or taking the deposition upon oral examination of party or witness concurrently with the taking of such deposition noticed or commenced earlier.
>
> It shall be the duty of all attorneys to make every reasonable effort to stipulate as to the exact places, dates and times for the commencement and resumption of the taking of all such concurrent depositions. In the event that attorneys are unable to so stipulate, any party may apply to the court for an order fixing the same and other terms and conditions to govern such depositions, as well as for any other order or relief relating thereto."

The import of Rule 4 is that it is plaintiff's obligation to move its discovery forward, so that as a matter of law plaintiff-appellee may not rely on ad hominem attacks on defendant-appellant Smith's counsel for "pettifogging" (Appellee's Brief, p. 15), and supposed "procedural maneuvering and wrangling." (Appellee's Brief, p. 18)

The reason the record before this Court is devoid of notices of deposition by plaintiff is because there were none.

Plaintiff to date has conducted only one deposition of any defendant, and that event did not occur until February, 1976 (The order of preliminary injunction issued May 1, 1975). Plaintiff's counsel served first sets of interrogatories on defendants only after the within appeal was noticed (and, incidentally, decided to "expedite" by formally moving the Court for sanctions on Smith's failure to answer plaintiff's interrogatories just 34 days after they were served).

The record before the District Court is bare of any failure or refusal by Smith to expedite discovery. Smith repeatedly and formally urged plaintiff to proceed with its discovery efforts, including deposition of Smith employees or officers (A179).

There is no need to belabor further the points of defendant-appellant Smith's main brief at page 22 et seq., except to say that the problem of trial delay is clearly not a "small or insignificant matter".

Plaintiff's refusals to pay are not a "small or insignificant matter"

Defendant-appellant relies on discussion of plaintiff's refusal to pay at page 17 et seq. of Smith's main brief, without repetition.

It is worth noting, however, that plaintiff-appellee's brief includes a protracted discussion of reasons for plaintiff's refusals of payment, which discussion concludes with the observation that "Clearly this claim that SISCO refused to pay has its basis in the failure of SMITH, in violation of the Court's order...to advise SISCO of the discount plan. Thus, of the total sum of $4,578.91, $3,309.13 was in sharp dispute that is yet to be resolved...." (Appellee's brief, pp.8-9) In addition to constituting an implicit admission that some payments refused by plaintiff were not in dispute, the quoted statement is a notice of issues yet to be resolved by the District Court. Apparently, the payments of plaintiff "under protest", referred to in plaintiff-appellee's brief at page 8, were intended to delay resolution of a problem "yet to be resolved", rather than to solve it. The effect of delaying resolution of the problem by payment "under protest" is

to leave the impression, incorrectly, that further "continuous...repeated supervision of a court" will not be required concerning plaintiff's payment practices. (See Bethlehem Engineering Export Co. v. Christie, discussed in Smith's main brief at pages 29-30, 32-33). Apparently, the opposite is true, and further District Court involvement in the payment problem is required.

The nature of Smith's application for relief

It is apparently plaintiff-appellee's position that its derelictions have been so "small and insignificant" that it was within the District Court's discretion to refuse orders of any kind in response to Smith's application for relief. The legal standard for exercise of Court discretion has been discussed in Smith's main brief, and will be discussed further under Point II of this reply brief. However, it is appropriate here to respond to plaintiff-appellee's "small and insignificant" argument by pointing out that the District Court refused any

relief whatsoever to Smith. Indeed, the District Court did not refer Smith's September, 1975 application for relief to Magistrate Catoggio for report until December 23, 1975, that reference occurring because of the suggestion of counsel for Smith . (A282)

Clearly, the derelictions of plaintiff are not so small as to justify the District Court's refusal of relief of any kind. The procedural alternatives available to the District Court were set out in a Smith memorandum to the District Court served September 23, 1975 (Index on Appeal - 25), as follows:

> "[T]here are three remedial alternatives available to the Court:
>
> 1. Dissolve the preliminary injunction.
>
> It is respectfully submitted that the Court ought to leave the plaintiff to the usual remedy of money damages if it proves antitrust violations against Smith, it now being clear that plaintiff has come to this Court with unclean hands and has used the protection of preliminary injunction as a license for business practices well beyond the usual, and clearly beyond the Court's expectation at the time the preliminary injunction order was entered. That license ought to be revoked.
>
> 2. Issue directions to plaintiff to cease its practices damaging to Smith's business.
>
> Should the Court think plaintiff's performance consistent with continuation of the preliminary injunction, there might be a value in the Court's entering a supplemental order directing plaintiff not to issue further public statements disparaging Smith and its agents. In this connection, it is worth mentioning that the Court's careful control

over its preliminary injunction order is of concern not only to Smith as a business entity, but also to Paul Toth and Bernard Gill as individuals. Both are men with families and careers with an obvious and substantial concern that a preliminary injunction order against Smith not be a license for Robert Schwimer [plaintiff's Vice President] to insult them as he pleases. An apology and promise of gentlemanly behavior from Robert Schwimer is not an assurance against further obloquy and does not define the nature of the license given Robert Schwimer by this Court.

Just as the Court might order plaintiff to cease its campaign of villification, there is a logical possibility of a Court order directing plaintiff to submit correct and honest warranty forms to Smith, and further directing plaintiff to cease charging to Smith the cost for service performed out of Staten Island.

A related procedural problem concerns the complaint at page 9 of Robert Schwimer's affidavit of September 18, 1975 that Gerald Hurst's letter of September 4, 1975 'sets forth a veiled threat that they [Smith] will not continue to ship unless these few dollars totaling $830.00 in all, are not paid by September 15.' Is Robert Schwimer correct in reading the Court's preliminary injunction order as giving plaintiff license to refuse payments due to Smith, without sanction?

It is submitted that plaintiff should be paying like any other distributor, and not taking the preliminary injunction order as a license not to pay.

> The difficulty with further directions of this Court to plaintiff in such matters is, of course, that the directions would deal with activity of plaintiff which is either patently improper or already precluded by this Court's order of May 1, 1975.
>
> 3. Do nothing.
>
> The alternative of issuing no remedial order as a consequence of plaintiff's activities during the preliminary injunction period would strongly suggest a license to plaintiff to do as it pleases with Smith and its agents, subject only to later apologies and explanations of plaintiff based on claims of confusion and provocation."

Unfortunately, the District Court issued no remedial order at all, so that plaintiff has a seeming license under the pending preliminary injunction to do as it pleases with Smith and its employees. As already amply pointed out, plaintiff has used that seeming license repeatedly during the period of preliminary injunction.

The purpose of this appeal is to obtain a ruling revoking plaintiff's seeming legal license to harm Smith.

POINT II

The principles of law relevant to the District Court's exercise of discretion

The instant case raises the issues anticipated

in Semmes Motors, Inc. v. Ford Motor Company, 429 F. 2d 1197 (2d Cir., 1970). In Semmes this Court upheld issuance of an injunction against termination of plaintiff's distributorship, notwithstanding that defendant Ford's affidavits filed in the District Court showed fraudulent warranty administration claims by plaintiff. Some of the Ford affidavits on warranty administration fraud were served with a motion to the District Court to vacate the preliminary injunction, the motion to vacate being made the same day the preliminary injunction order issued.

On the appeal, appellant-defendant Ford argued that the demonstrated warranty administration fraud of plaintiff precluded issuance of a preliminary injunction. Plaintiff-appellee Semmes took the position on the appeal that the very existence of fraud was disputed in the record before the District Court; and that in any event the relevant distributorship contract required a grace period for plaintiff to cure any wrongdoing, which wrongdoing apparently halted before the preliminary injunction hearing. Semmes, supra, p. 1205-7. (Semmes is, of course,

distinguishable from the instant matter on these points: the incidence of false warranty information is admitted by plaintiff in the instant matter, and the wrongdoing in the instant case occurred after rather than before the preliminary injunction order issued.)

The Ford motion to vacate was made the same day the preliminary injunction order issued, and concerned facts which occurred before the original preliminary injunction hearing, and already litigated at the hearing. Semmes, supra, p. 1201. Therefore, this Court characterized the motion to vacate as an inappropriate effort to relitigate issues already decided.

In sustaining the preliminary injunction order in Semmes, this Court explained that "In light of the imbalance of hardship, affirmance of the temporary injunction does not depend on a holding that Semmes had demonstrated a likelihood of success; it is necessary only that Semmes 'has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation [citation omitted].'" (429 F.2d, at 1205)

The same test was, of course, applied by the District Court in issuing the preliminary injunction order in the instant case (A25-26).

As previously mentioned, the Semmes facts involved only warranty administration fraud occurring prior to the preliminary injunction hearing. This Court's opinion cannot properly be read for the proposition that the "balance of hardships" test will apply during the period of preliminary injunction. Clearly, if Semmes had continued the practice of submitting false warranty claims to Ford during the period of preliminary injunction, the preliminary injunction would have been vacated, and the plaintiff would not have had again the benefit of the "balance of hardships" test. It is important that this Court explained: "[A]ny dealer who regards it [the District Court opinion in Semmes] as a Magna Carta for cheating Ford or any other manufacturer does so at his peril." Semmes, p. 1205.

Once a preliminary injunction is in place, application of the "balance of hardships" test as applied at the outset would have the effect of a "Magna Carta for

cheating." Application of the "balance of hardships" test to wrongdoing occurring during the period of preliminary injunction would permit any level of wrongdoing by plaintiff, whether fraud, personal villifications, and refusals to pay, so long as the consequence to the defendant was not as serious as plaintiff's interest in continuing the equitable remedy of preliminary injunction.

No relevant reported case has ever stated that a "balance of hardships" test applies to wrongdoing occurring during the course of a preliminary injunction. It is respectfully submitted that this Court should take the opportunity afforded by the instant case to make it clear that a preliminary injunction is not a license to engage in improper conduct or purposeful delay, and that the usual equitable principles of clean hands apply to wrongdoing occurring after a preliminary injunction is in place.

CONCLUSION

The order of the District Court dated January 15, 1976, should be reversed and the preliminary injunction dissolved.

Respectfully submitted,
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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC

UNITED STATES COURT OF APPEAL
FOR THE SECOND XXXXXX CIRCUIT

STATEN ISLAND SUPPLY CO.,
Plaintiff- Appellee,

- *against* -

A.O. SMITH CORP., etal.,
Defendants,
and
A.O. SMITH CORP.
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the 14th *day of* April *19* 76 *at* 410 Park Avenue, New York, New York

deponent served the annexed Reply Brief *upon*
Louis Pulvermacher

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 14th
day of April *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE